

# PUBLIC MEETING MINUTES

## MONTANA SUPREME COURT PUBLIC MEETING

**Tuesday, December 15, 2015, 1:00 p.m.**

**Joseph P. Mazurek Justice Building  
215 North Sanders, Helena  
Attorney's Lounge, 4th floor**

**FILED**

**FEB 02 2016**

### **MINUTES**

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

Chief Justice McGrath called the meeting to order at 1:00 p.m.

In attendance were Justices Rice, Baker, Cotter, Shea, Wheat, and McKinnon.

Also present were the following people:

Chris Manos, Betsy Brandborg, Joe Menden, Ann Goldes, and Kathie Lynch on behalf of the State Bar of Montana;  
Bruce Spencer, current Vice President and President-Elect of the State Bar of Montana;  
Jacqueline Lenmark on behalf of the Board of Bar Examiners;  
Annie Goodwin, Chair of the Commission on Character and Fitness;  
Alison Paul, Executive Director of the Montana Legal Services Association;  
Matthew Sack, an attorney licensed in Pennsylvania and New Jersey, currently residing in Bozeman, and planning to seek admission by motion to practice in Montana in January 2016;  
Chris Wethern, Staff Attorney for the Montana Supreme Court;  
Aislinn Shaul-Jensen, Haley Nelson, and Anna Maria Kecskes, Law Clerks for the Montana Supreme Court.

### AF 11-0244 AMENDMENTS TO RULES FOR ADMISSION TO THE BAR OF MONTANA

- Justice Baker discussed her edits to the Amendments to Rules for Admission to the Bar of Montana.
- Justice Baker noted that Rule I(G)(7) creates a fee waiver for legal aid organizations, but the language as drafted is too broad. She suggested the fee waiver for those admitted on motion should be limited to individuals working for Access to Justice Organizations (as defined by the Montana Rules of Civil Procedure) and also include the Office of the Public Defender (OPD) and Appellate Defenders. She did not want the language to be so broad that it could include any firm that does pro bono work.

- Justice Baker also stated that the fee should be waived for attorneys on Emeritus status, who are limited to doing pro bono work. Justice Baker agreed that the rules should be self-reporting, like all other rules governing lawyers.
- Justice Cotter suggested that those who qualify for a fee waiver should be working “full-time,” and that should be added to the rule. The first sentence of Rule I(G)(7) would then read: “The application fee must be waived for an applicant for admission on motion under Rule V who is employed by or has secured full-time employment with an Access to Justice Organization . . . .” The fee waiver is meant to apply only to those admitted on motion.
- Justice McKinnon expressed concern about adopting a pro bono waiver when the attorneys receiving the waiver are still being paid to do their work. She noted that it is the organizations that do the work for free, not the attorneys, so the fee waiver is not directly related to the amount of pro bono services provided by an individual attorney.
- Justice Wheat is in favor of the fee waiver because it is difficult to recruit individuals into the legal services and criminal defense fields.
- Justice Baker is in favor of the fee waiver for retired attorneys who move to Montana and wish to only do pro bono work (referring to attorneys on Emeritus status).
- Justice McKinnon stated that many firms do a lot of pro bono work, and it is difficult to distinguish between firms providing pro bono services and pro bono organizations.
- Chief Justice McGrath recommended addressing Justice Baker’s edits in order, then allowing for comment, then moving for adoption of the rules.
- Justice Baker recommended inserting the word “active” to Rule V(A)(2), so that it reads “must have been admitted by bar examination to practice law and engaged in the active practice of law for at least five of the seven years preceding application to Montana . . . .” The term “active” would replace the term “actual” in an earlier draft.
- Justice Baker also addressed an e-mail question from attorney Gary Zadick of Great Falls about the *pro hac vice* policy. Justice Baker hoped edits to Rule V(A)(6) would clarify that an attorney will not be denied admission on motion for the sole reason that he or she exceeded the allowed number of *pro hac vice* motions to practice in Montana.
- Justice Baker suggesting replacing “eligible” with “admitted” in Rule V(C)(5)(a) so that it reads “the applicant has been admitted to engage in the active practice of law . . . .”
- Justice McKinnon asked whether there was a conflict in the language of Rule V(A)(8) and Rule V(A)(2) because subsection 8 allows an applicant to have resigned in good standing, and subsection 2 requires an applicant to have been engaged in the active practice of law for at least five of the seven years preceding application.
- Justice Baker clarified that the rules’ intention is that, even if an applicant resigned in good faith, he or she cannot apply for admission on motion unless he or she actively practiced law for five of the past seven years.

- Chief Justice McGrath noted that the new rules for admission by motion had an extensive public comment period. He thanked the State Bar of Montana and the Bar Admissions Committee for all their work on the rules and opened the discussion for public comment.
- Attorney Matthew Sack commented on the admission on motion rules. Mr. Sack has been admitted to practice in New York and Pennsylvania since 2006, and he was scheduled to take the bar exam in Montana in July 2015 when he heard about the possible rule change. He had three questions for the Court. First, Mr. Sack asked if his payments of the \$150 for the Montana Law Seminar and his admission payment of \$400 to the State Bar could be credited towards the \$2,500 fee charged for those wishing to be admitted by motion. Second, he also asked whether he would have to wait for an admission ceremony to be admitted to the Bar. Third, he inquired about the required documents for admission by motion, particularly the letter from the highest court where you practiced. He said the Pennsylvania Supreme Court rejected his request for a letter, but he had all other required documents.
- Chief Justice McGrath explained that the Clerk of the Supreme Court can swear in new admittees at any time.
- Betsy Brandborg said that the State Bar of Montana can contact the State Bar of Pennsylvania.
- Justice Baker said the rules allow for the Supreme Court to waive the rules, and Mr. Sack should ask the Court to waive the rule that he have a letter from the Pennsylvania Supreme Court, rather than revise the rule to address this unique situation.
- Alison Paul with MLSA thanked the Court for waiving the admission fee for attorneys who wish to work for Access to Justice Organizations; however, she expressed concern about the “full-time” requirement. She stated that many of their positions are not full-time due to funding.
- Justice Cotter withdrew her suggestion of adding the “full-time” requirement.
- Jacqueline Lenmark stated that she helped create the first draft of the admission on motion rules, and much of the language discussed by Justice Baker was adopted was from the Supreme Court’s Order, including “actual” vs. “active” on page 12, and “eligible to engage” on page 14.
- Justice Baker assured Ms. Lenmark that the changes were intended to address the concerns of the Board and the Bar, and asked for her comment on those revisions.
- Ms. Lenmark stated that she supported all the changes.
- Chief Justice McGrath then asked Justice Baker to address an e-mail from Ms. Lenmark and Ms. Brandborg which outlined other concerns with the draft rules.

- Justice Baker stated that the voluntary reporting process for pro bono work extended to applicants for admission by motion and did not need to be separately listed in the rules. The process is set forth in the Admissions Checklist referenced in Rule I(D)(2) and implicitly referenced in Rule V(C).
- Justice Baker suggested changing Rule I(G)(6) to read “the first year’s bar fees and assessments, including assessments for the Office of Disciplinary Counsel” instead of “the first year’s bar dues and fees, including fees for the Office of Disciplinary Counsel.” Similarly, Rule X(E)(2) would read: “State Bar of Montana fees and assessments” instead of “State Bar of Montana dues;” and Rule X(E)(3) would read: “fees and assessments of the Office of Disciplinary Counsel” instead of “fees of the Office of Disciplinary Counsel.”
- Justice Baker suggested redrafting the *pro hac vice* disclosure referenced in Rule VI(D)(5) to eliminate the formal notification requirement. Instead of reading “whether the applicant has been formally notified of any complaints pending” the rule would read “whether the applicant is the subject of any written complaint.” Justice Baker also wished to include a requirement at the end of that subsection that the applicant include a copy of the complaint with his or her application. She suggested using that same language in Rule IV(A)(5), regarding admission by transfer of UBE score, as the requirements are identical.
- Justice Baker agreed that the Court should add language to Rule VIII(A) indicating that an applicant need only complete the Montana Law Seminar once for admittance, even if the applicant failed the bar or the application was lacking in some other way.
- Justice Baker asked about the language in Rule XI(C), specifically whether it was necessary to include language indicating that the Commission on Character and Fitness and the Montana Board of Bar Examiners may not unreasonably withhold approval of the appointment of a Bar Admissions Administrator by the Executive Director of the State Bar of Montana.
- Bruce Spencer of the State Bar of Montana stated that the language was from a Memorandum of Understanding (MOU). The State Bar, the Commission, and the Board spent two years deciding what the relationship between the three entities would be, and the language mirrors that MOU. The MOU indicates that the approval is more of a consultation and does not allow for an unreasonable veto of the appointment of the Executive Director.
- Justice Cotter supported adding the requested language.
- Justice McKinnon asked about Mr. Sack’s comments regarding whether an admission payment already made could be credited towards the \$2,500 application fee for admission on motion.

- Justice Baker stated that some of the fee is required because it goes to the National Conference of Bar Examiners (NCBE), but Mr. Sack should request that the Court credit him for a portion of his fee in his motion for admission.
- Justice McKinnon asked about language in the definitions section for admission on motion, Rule V(D)(1)(d). As written it appeared to reference the practice of law in federal courts, but not the State Judiciary.
- Justice Baker recommended reordering the definition to read: “service as a judge in a local, state, territorial, or federal court of record in the United States.”
- Ms. Lenmark expressed a concern about making sure U.S. courts outside of the United States are included.
- Justice Baker recommended changing “in the United States” to “of the United States.”
- Chris Manos inquired about pro bono reporting requirements being on the checklist for admission for all applicants.
- Justice Baker explained that pro bono work and reporting is voluntary.
- Mr. Spencer discussed the fee payments made to the State Bar and the Court Administrator’s Office. He explained that checks made out to the Commission go through the State Bar first and then are distributed as the Commission does not have a checking account.
- Kathy Lynch asked about applicants who paid fees, but now were hoping to be admitted on motion.
- Chief Justice McGrath stated that applicants for admission by motion who had already paid fees to the State Bar of Montana should ask the Court to credit those fees to the \$2,500 admission fee for admission by motion. Chief Justice McGrath said this issue should be assessed on a case-by-case basis.
- Justice Cotter moved to adopt the rules as amended.
- Justice Shea seconded the motion for adoption made by Justice Cotter.
- Justice Rice stated there may be potential issues with the fee for admission by motion, and he suggested a reduced fee for certain types of employment such as \$250. He indicated a concern that some people may receive a fee waiver for working-part time at an Access to Justice Organization, while simultaneously working part-time at a law firm.
- Chief Justice McGrath voiced a concern that attorneys at OPD and Appellate Defenders, who would receive a fee waiver under the amended language, but are paid the same as prosecutors, and prosecutors would not receive the waiver.

- Justice McKinnon wondered whether the Court should make a fee exception just for Montana Legal Services.
- Justice Baker suggested taking out OPD and Appellate Defenders from the waivers, and only including those working specifically at Access to Justice Organizations.
- Justice Wheat stated that he was in favor of the fee waiver because the goal of the waiver was to encourage people to come and work in legal services areas in Montana. He believed few people would take advantage of the rule for nefarious reasons.
- Justice Baker moved to strike the waiver for OPD and Appellate Defenders.
- Chief Justice McGrath noted that there was a consensus to Justice Baker's motion and asked the Court to consider the rule amended.
- Chief Justice McGrath called for a vote.
- The justices voted unanimously in favor of the amended rules.
- Chief Justice McGrath specifically thanked all those who worked on this. Specifically, the Chief Justice wished to thank Marie Connelly of the State Bar for all her work over the years and for her efforts in drafting the admission by motion rules.
- Chief Justice McGrath also specifically thanked Chris Wethern, staff attorney at the Montana Supreme Court, for all her work on this project. The Court will give Chris a cookie in appreciation.
- Justice Baker asked whether the language of the MOU discussed by Mr. Spencer should be included in the amended rules.
- Justices Cotter and Wheat agreed that the MOU's language should be in the rules.
- Chief Justice McGrath noted that there was a consensus to add language coordinating to the MOU into the rules.

#### AF 06-0623 APPOINTMENT TO THE COMMISSION ON COURTS OF LIMITED JURISDICTION

- Chief Justice McGrath stated that Retired Judge Douglas G. Harkin of Missoula was stepping down from the Commission.
- Chief Justice McGrath stated that Judge Heidi Ulbricht in Kalispell is interested in appointment to the Commission.
- All Justices voted in favor of appointing Judge Ulbricht to the Commission.

## AF 06-0238 APPOINTMENT TO THE JUDICIAL NOMINATION COMMISSION

- Chief Justice McGrath recommended nominating Karl Englund of Missoula to the Commission, stating Mr. Englund has high ethical standards, good judgment, and a sense of humor.
- Justice Baker stated that Kelly Gallinger of Billings had been nominated in the past and has expressed continued interest. She wondered if there was an issue geographically with appointing Ms. Gallinger.
- Chief Justice McGrath explained that the Commission must have a lawyer from Eastern Montana and a lawyer from Western Montana under § 3-1-1001, MCA, and the last appointment to the Commission was a lawyer from Billings.
- Justice McKinnon expressed concern that the Court needed to appear objective, as the last appointment was a member of the Montana Trial Lawyers Association, and she supported the appointment of Ms. Gallinger. However, if Ms. Gallinger was not geographically eligible, she wanted to think about a different nominee.
- Justice Rice also supported the appointment of Ms. Gallinger.
- Justice Wheat expressed support for Mr. Englund, citing his stature, leadership, and ability to question judicial candidates' qualifications. He did not object to Mr. Englund's membership in the MTLA and stated that Mr. Englund was a stellar member of the Bar.
- Justice Shea expressed support for Mr. Englund.
- Justice Wheat moved to appoint Mr. Englund. He noted that Ms. Gallinger was not statutorily eligible for the position (because of her location in Eastern Montana).
- Justice McKinnon asked if the vote could be delayed.
- Chief Justice McGrath responded that the item was on the agenda, and the Commission would be appointing a judge in Miles City in January and in Great Falls immediately after.
- Justice Baker seconded the motion of Justice Wheat for appointment of Mr. Englund.
- Chief Justice McGrath and Justices Rice, Baker, Cotter, Shea, and Wheat all voted for the appointment of Mr. Englund.
- Justice McKinnon voted nay.

## AF 06-0216 APPOINTMENTS TO THE COMMISSION ON TECHNOLOGY

- Chief Justice McGrath asked for this item to be passed because he had not yet collected names of individuals interested in serving on the Commission or confirmed if the current members wanted to be reappointed.
- The Justices agreed to pass this item.

AF 12-0292 APPROVAL OF BOND SCHEDULE FOR COURTS OF LIMITED JURISDICTION

- Chief Justice McGrath discussed the need to provide courts of limited jurisdiction with guidance and recommendations for setting bond schedules. He emphasized that the schedule is merely a recommendation for courts setting a bond and was necessary for consistency.
- It was noted that judges often are not involved “90% of the time” if a bond is paid.
- Justice Baker said she had discussed the matter with Beth McLaughlin, the Court Administrator. Ms. McLaughlin stated that setting a bond is part of Ms. McLaughlin’s training with judges, but the Supreme Court’s Order on the matter does not match the information online because it does not clearly indicate that it is merely a recommendation.
- Justice Baker stated the need for courts of limited jurisdiction to consider the accused individual’s financial ability to pay bond, citing the following statutes:
  - § 46-9-108(2), MCA: “The court may not impose an unreasonable condition that results in pretrial detention of the defendant . . . .”
  - § 46-9-301(6), MCA: Among other factors, the amount of bail must be “considerate of the financial ability of the accused . . . .”

Justice Baker recommended adding language from these statutes to the order setting the recommended bond schedule.

- Justice Wheat inquired if excessive bail has been a problem in Montana.
- Justice Rice and Justice Wheat expressed concern with emphasizing one section of § 46-9-301, MCA, over another.
- Justices Baker and Cotter explained that civil lawsuits have resulted from excessive bail in some communities. Justice Cotter explained that the DOJ investigation in Ferguson, Missouri, revealed excessive bail was set to help raise revenue for the municipality.
- The justices agreed that any order about setting bond should cite to § 46-9-301, MCA, but not include explicit language from that statute. The Justices also agreed to put the term “Recommended” in the heading of the order.
- Justice McKinnon stated that it is important for lower courts to have guidance when setting a bond schedule, and this is not an issue that the Supreme Court sees very easily on appeal.
- Chief Justice McGrath noted that there was a consensus among the justices to add “Recommended” to the title of an order setting a bond schedule and to reference § 46-9-301, MCA.

Chief Justice McGrath asked for further comments. Receiving none, he adjourned the meeting at 2:00 p.m.

Duly Submitted  
Haley Nelson  
Aislinn Shaul-Jensen  
Law Clerks

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